

NOTICE OF APPEAL TO APPELLATE DIVISION, THIRD DEPARTMENT FROM  
DECISION, ORDER & PARTIAL JUDGMENT OF SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ESSEX

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In the Matter of

SUZANNE CARRILLO KERN, HOWARD KERN,  
JEFFREY HAIDINGER, JOHN BRENNAN, JEAN  
BRENNAN, MARY ANN RANDALL, and  
CHRISTOPHER COHAN,

**NOTICE OF APPEAL**

Index No.: CV21-0370

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules  
and for Declaratory Relief

-against-

ADIRONDACK PARK AGENCY, PAUL LEINWAND,  
and MARIA CICARELLI,

Respondents-Defendants.

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PLEASE TAKE NOTICE that Petitioners-Plaintiffs Suzanne Carrillo Kern, Howard Kern, Jeffrey Haidinger, John Brennan, Jean Brennan, Mary Ann Randall, and Christopher Cohan hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from each and every part of the Decision, Order & Partial Judgment of the Honorable Richard B. Meyer of the Supreme Court dated June 29, 2022 and entered in the Essex County Clerk's Office on June 29, 2022. A copy of the Decision, Order & Partial Judgment is attached hereto as Exhibit A.

Dated: Glens Falls, New York  
July 26, 2022

By: Claudia K. Braymer  
Claudia K. Braymer  
Attorney for Petitioners-Plaintiffs  
BRAYMER LAW, PLLC  
PO Box 2369  
Glens Falls NY 12801  
(518) 502-1213  
claudia@braymerlaw.com

TO:

Joshua M. Tallent  
Assistant Attorney General  
*Attorney for Respondent-Defendant*  
*Adirondack Park Agency*  
NYS Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224

Dennis J. Phillips  
*Attorney for Respondents-Defendants*  
*Paul Leinwand and Maria Cicarelli*  
McPhillips, Fitzgerald & Cullum, LLP  
288 Glen Street, P.O. Box 299  
Glens Falls, NY 12801

**Supreme Court of the State of New York**  
**For the County of Essex**

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Submitted May 13 , 2022

Decided June 29, 2022

Index No.: CV21-0370  
IAS No.: 15-1-2021-0152E

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**SUZANNE CARILLO KERN, HOWARD KERN,  
JEFFREY HAIDINGER, JOHN BRENNAN,  
JEAN BRENNAN, MARY ANN RANDALL, and  
CHRISTOPHER COHAN,**

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– against –*

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Decision, Order & Partial Judgment

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MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -2-

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*Braymer Law PLLC* (*Claudia K. Braymer, Esq.*, of counsel),  
Glens Falls, New York for Petitioners-Plaintiffs.

*Letitia James, Esq.*, Attorney General of the State of New  
York (*Joshua M. Tallent, Esq.*, Assistant Attorney General,  
of counsel), Albany, New York for the Respondent-  
Defendant Adirondack Park Agency.

*McPhillips, Fitzgerald & Cullum, LLP* (*Dennis J. Phillips,  
Esq.*, of counsel), Glens Falls, New York for Respondents-  
Defendants Paul Leinwand and Maria Cicarelli.

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This is a combined declaratory judgment action and Article 78 proceeding in which the petitioners-plaintiffs seek to annul, vacate and set aside a May 27, 2021 letter (2021 Compliance Letter) and permit amendment dated June 18, 2021 (2021 permit amendment) issued by the respondent, Adirondack Park Agency (APA) to the respondents, Paul Leinwand and Maria Cicarelli (Leinwand/Cicarelli), approving plans for development of a 3.2-acre parcel of residential real property located, and being designated as Lot #9 (the project site) in the Deerwood Subdivision (the "subdivision"), in the town of Santa Clara, Franklin County, New York. The petitioners-plaintiffs also seek to enjoin Leinwand/Cicarelli from cutting trees and vegetation within wetlands on the project site and for a declaration that existing walking trails thereon are open to use by members of the subdivision's homeowner's association such that Leinwand/Cicarelli may not prevent the same.

The petitioners-plaintiffs, Suzanne Kern and Howard Kern (Kern), own Lot #10 in the subdivision which is southeasterly of the project site and with which it shares a common boundary. Petitioner-plaintiff, Jeffrey Haidinger (Haidinger), owns Lot #3 which is southeasterly of and adjacent to the Kern lot. There is a common access

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -3-

road running in an east-west direction across those three lots from Kempton Road to the common boundary of the Leinwand/Cicarelli and Kern lots. Also, the wastewater treatment system for the Kern lot is located off-site easterly of both the Kern and Haidinger lots to an area south of a tennis court and situated between the southerly boundary of the common right-of-way and the northern boundary of Lot #1<sup>1</sup>. The petitioners-plaintiffs John Brennan and Jean Brennan (Brennan), as well as Mary Ann Randall (Randall) and Christopher Cohan (Cohan), own properties approximately 500 yards and 250 yards, respectively, from the project site and are not part of the Deerwood Subdivision.

A document list of all papers considered by this Court is attached hereto.

## A.

The lands comprising the Deerwood Subdivision consist of a portion of a 55.22± acre parcel created as part of a two-lot subdivision approved by the APA in 1985. In 1985 and 1986, seven “nonjurisdictional” lots, three of which were on the shoreline of Upper Saranac Lake, were created out of that acreage, five of which were sold. By a permit issued to Edward and Dorothy Yanchitis (Yanchitis) on June 6, 1988, and designated “Project & Permit No. 87-74 (the “1988 Permit”)<sup>2</sup>, the APA approved subdividing the two unsold lots and the remaining acreage of the original 55.22± acre parcel, classified low intensity use on the Adirondack Park Land Use and Development Plan Map, into the Deerwood Subdivision<sup>3</sup> containing seven lots, five of which would be building lots and designated as lots six through ten, and the other two would be a non-building lot and an open-space lot. The open-space lot featured a 25± acre wetland complex with a bog pond and a bog mat area with periphery shrub and coniferous swamp fringes described

<sup>1</sup> See Respondent Leinwand Exhibit A, Map Showing Property Owned By Deerwood Associates by Bert K. Hough, L.S., completed February 2, 1987; also at Administrative Record R0023 in significantly reduced size.

<sup>2</sup> Administrative Record, pages R0001-R0018.

<sup>3</sup> A map of the subdivision, prepared by Bert K. Hough, a licensed surveyor, was completed on February 2, 1987, and was received in evidence as Respondent Leinwand’s Exhibit A.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -4-

as “a highly diverse and valuable wetland rated ‘2’ pursuant to 9 NYCRR 578.5”<sup>4</sup>, and a 1.56± acre bog pond and outlet stream flowing into Upper Saranac Lake. A common dock for the five building lots was approved, and expansion and improvement of an existing trail and driveway system was authorized.

As part of the APA’s permitting and review processes, soils test pits were dug on the lots now owned by Leinwand/Cicarelli and Kern, and on one other proposed lot<sup>5</sup>. The test pit on the Kern lot “revealed a well-drained medium to coarse sand with some redness in the upper level and no groundwater to eight ft.”, while the pit on the Leinwand/Cicarelli lot “revealed a red sand in the upper two ft., a sandy loam from two to six ft. with groundwater encountered at about four ft.”<sup>6</sup>. The permit noted concerns over the nature of the soil surrounding the wetland and the acidic/bog character of the wetland complex because of the effect of potential nutrient loading on the bog-wetland complex. Specifically, the APA identified adverse effects to bog vegetation from the addition of nitrogen and changes to the nutrient makeup of the waters of the bog-wetland complex such as a decrease in the species diversity of wetland systems as well as the replacement of species, and that changes in the distribution of plants would not only likely occur on the edges where ground water would be released to the wetland but also that further changes would radiate out from the direction of the ground water source. To address these concerns, Yanchitis proposed that there be “a common sewage area for [Leinwand/Cicarelli] and [Kern] away from the wetland in one of the former tennis court areas, a 200 ft. separation distance from the wetland for all new on-site sewage disposal systems and generally less vegetative cutting, land disturbance and overall intensity of use of the property.”<sup>7</sup>

In its conclusions of law and permit conditions, however, the APA did not require a common off-site sewage disposal area for the Leinwand/Cicarelli and Kern lots. Instead, the 1988 Permit concluded that “[t]he project would not have an undue adverse impact pursuant to

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<sup>4</sup> *Id.*, R0007.

<sup>5</sup> *Id.*, R0005.

<sup>6</sup> *Id.*, paragraph 13.

<sup>7</sup> *Id.*, R0008, paragraph 27.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -5-

Section 809(10)(e) of the Adirondack Park Agency Act provided that all new on-site sewage disposal systems are located more than 200 ft. from the wetland, the lake, and any existing water supplies/wells, and provided that all systems are designed to slow nutrient infiltration towards the wetland and the lake.”<sup>8</sup> The APA imposed conditions for the subdivision project which included prohibiting the construction of principal buildings on Lots #11 and #12, the open space parcel, and all areas of the subdivision other than Lots #1 through #10. Lots #1 through #10, which included the Leinwand/Cicarelli and Kern lots, were each limited to having not more than one principal building constructed. For each of Lots #6 through #10, which included the Leinwand/Cicarelli and Kern lots, APA approval of “site specific plans” depicting, *inter alia*, “building location, \* \* \* well or water supply location, \* \* \* [and] on-site sewage disposal facilities” was required.<sup>9</sup> Sewage disposal systems were to be designed by a New York licensed engineer “for a ‘Soils Replacement Type System’ (Nutrient Entrapment) and incorporate at least two ft. of fill with a percolation rate of 15 to 45 minutes /inch, below and or around the distribution lines”<sup>10</sup>, and depict “on-site sewage disposal facilities such as septic tanks, pumping stations and distribution boxes”<sup>11</sup> set back a minimum of 200 feet “from existing water supplies/wells located on any adjoining properties.”<sup>12</sup> Finally, each wastewater treatment system’s leaching portion had to “be set back a minimum of 200 ft. from wetlands on the site from the mean high water mark of Upper Saranac Lake and from any existing water supplies/wells located on adjoining properties.”<sup>13</sup> Also, the application’s proposal for the existing trail and driveway system, and its requested expansion, to be used “for access to building locations and common areas (such as tennis courts and common dock) \* \* \* [and] for nonmotorized recreational activities such as hiking and cross country skiing”<sup>14</sup> was approved subject to the prohibition that there be “no vegetative cutting or other disturbance within the boundaries of the

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<sup>8</sup> *Id.*, R0010, paragraph 4

<sup>9</sup> *Id.*, R0011, paragraph 5.

<sup>10</sup> *Id.*, paragraph 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, paragraph 7.

<sup>14</sup> *Id.*, R0005, paragraph 15.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -6-

wetlands” without prior APA review and approval<sup>15</sup>. The terms and conditions of the 1988 Permit are specifically made “binding upon the heirs, successors, agents and assigns of the applicant”<sup>16</sup>, the applicant being the common grantor of Kern, Haidinger, and Leinwand/Cicarelli.

In May 1992, the 1988 Permit was amended and supplemented by an APA permit<sup>17</sup> designated “Project 87-74A” (the “1992 Amendment”) which eliminated the common docking facility and authorized the construction of one dock on each of Lots #9 and #10. A path and boardwalk to the shoreline of Upper Saranac Lake constructed by Dorothy and Edward Yanchitis (Yanchitis), the predecessors in title to the Leinwand/Cicarelli property, was approved by the APA in June 2008<sup>18</sup>.

Leinwand/Cicarelli entered into a contract to purchase Lot #9 from Yanchitis in August 2020, the terms of which included contingencies for APA “approval for the construction of the wastewater treatment system on Lot 9” and “engineering confirmation by a New York licensed Professional Engineer of the ability to build a home in the building envelope of Lot 9 based on soil tests to assure a solid foundation”<sup>19</sup>. Leinwand/Cicarelli retained Joseph A. Garso, P.E.(Garso) of North Woods Engineering, PLLC to conduct soil testing on the property, which was done in September 2020.

In November 2020 Leinwand/Cicarelli requested a pre-application meeting with APA staff to discuss, among other things, construction of the sewage system on Lot #9 with the setback from wetlands reduced from 200 feet to 100 feet, modification of the existing permit to allow for construction of a boathouse, and confirmation of where the house, separate garage and sewage system could be located. In their request, Leinwand/Cicarelli represented that they understood that the septic system already installed in the common area to service Lot #10 was not designed as a common system and presented practical difficulties for the

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<sup>15</sup> *Id.*, R0012, paragraph 10.

<sup>16</sup> *Id.*, R0010, paragraph 2.

<sup>17</sup> *Id.*, R0019-R0023.

<sup>18</sup> *Id.*, R0024.

<sup>19</sup> *Id.*, R0030.



MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -7-

construction of a separate system for Lot #9 within that common area<sup>20</sup>. Shortly thereafter, Leinwand/Cicarelli submitted additional information consisting of a letter from Garso dated November 20, 2020, and hand-drawn maps and product information for an enhanced wastewater treatment system equipped with a microbial inoculator generator and a peat fiber biofilter<sup>21</sup>. Garso references a conversation with Shaun Lalonde (Lalonde), a now-retired professional engineer with the APA, in which Lalonde “indicated that the APA would consider a 100’ setback if advanced wastewater treatment was proposed”<sup>22</sup>. According to the manufacturers’ product information, specialized aerobic bacteria are introduced and released” in the inoculator generator “resulting in an effluent that is cleaner and oxygen enriched”<sup>23</sup>, while the peat fiber biofilter is a watertight septic tank in which “[a] combination of biological, chemical and physical processes treat the effluent as it filters through the peat fiber media”<sup>24</sup>.

In an email exchange between Leinwand and Milt Adams (Adams), an APA environmental program specialist, during the period of December 4, 2020, and January 21, 2021, Leinwand provided engineer-stamped site and wastewater treatment system plans for Lot #9<sup>25</sup>. Leinwand ultimately agreed to remove a proposed boathouse and boardwalk from the permit amendment request and Adams advised that the request must show “a leaching facility that complies with the 100 foot setback to wetlands and waterbodies [and] . . . with the 200 foot setback to wells”, as well as the installation of “soils in accordance with [New York State Department of Health] Design standards to slow the percolation rate [ ] and [s]ome type of pretreatment for nutrient loading such as a peat system”<sup>26</sup>. Leinwand/Cicarelli filed their permit amendment application with the APA on January 29, 2021. In response, the APA referenced the “design percolation rate of 1 to 5 minutes per inch and requested

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<sup>20</sup> *Id.*, R0026-R0027.

<sup>21</sup> *Id.*, R0036-R0047

<sup>22</sup> *Id.*, R0040.

<sup>23</sup> *Id.*, R0042.

<sup>24</sup> *Id.*, R0046.

<sup>25</sup> *Id.*, R0059-R0062.

<sup>26</sup> *Id.*, R0052-R0058.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -8-

additional information<sup>27</sup> establishing that the proposed sewage disposal system complied with condition 6 of the 1987 APA permit by “use of amended soils to slow the percolation rate to 15-45 minutes per inch \* \* \* [t]o adequately protect the bog wetland complex” and instructing Leinwand/Cicarelli to “amend these fast percolating soils via soil replacement or blending to a final soil percolation rate within the required range”.

On February 17, 2021, in an email to APA staff, Garso furnished additional information explaining the proposed wastewater treatment system. This included a letter dated February 9, 2021, emailed by Garso to Leinwand in which Garso reported that the two-soil percolation tests he performed in September 2020 showed that “the stabilized percolation rate [was] more than a minute for both percolation tests”<sup>28</sup>. Garso went on to declare that the proposed wastewater treatment system consisting of a 2,000-gallon dual compartment aeration septic tank with a two-tower microbial inoculator generator and peat filters would result in total suspended solids (TSS) in the peat filter effluent of one milligram or less per liter. It was also his professional opinion that this advanced wastewater treatment system as designed was “estimated to be more than 99 % effective at reducing BOD [biological oxygen demand] and TSS, and therefore, any additional treatment, in our professional engineering judgement, would be frivolous”<sup>29</sup>. However, on March 23, 2021, Garso submitted an amended wastewater treatment plan and a site plan<sup>30</sup> to the APA which removed the aeration tank<sup>31</sup> detailed, *inter alia*, soil amendment procedures to be undertaken. Those measures included the removal of “fast percolation rate soil from the proposed absorption field or bed area, extending at least five feet beyond any proposed absorption trench or bed” along with the blending of that soil “with fill material with a percolation rate in the range of 15 to 20 minutes per inch” so that the resultant blended material would have a percolation rate of 10-15 minutes per inch. Prior to construction of the wastewater treatment

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<sup>27</sup> *Id.*, R0188-R0189.

<sup>28</sup> *Id.*, R0142-R0143.

<sup>29</sup> *Id.*, R0143.

<sup>30</sup> *Id.*, R0193-R0197.

<sup>31</sup> Garso affidavit sworn to September 28, 2021, paragraph ; Affidavit of Alicia Purzycki sworn to September 30, 2021, paragraph 33.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -9-

system, that material would be stabilized, either by natural settlement over a period of six months or mechanical compaction in six-inch layers, and percolation tested to ensure that it met the permit condition requirements.

The site plan<sup>32</sup> depicted the elements required by the 1988 Permit<sup>33</sup>, including the location of the proposed residence and garage structures and wastewater treatment system components, as well various setback lines in order to portray the project's compliance with the setback and other requirements of the 1987 order. As so designed, the wastewater treatment system was situated more than one hundred feet from the APA-designated wetlands boundaries and water well, and greater than ten feet from the property lines. The septic tank was to be placed more than ten feet from the residence and garage buildings, and the absorption field would be sited more than twenty feet from those buildings. The residence and garage structures were positioned seventy-five feet or more from the wetland's boundaries and greater than twenty-five feet from the property lines. The site plan also showed an existing trail running from the Kern property (Lot #10) in a generally north-south direction adjacent to and/or within the proposed driveway until veering slightly to the west as it passes by the footprint of the proposed residence and continuing to and beyond the northerly property line.

On April 7, 2021, Leinwand and Garso met at the site with APA staff members Mary O'Dell (O'Dell), an APA Biologist 2 (Ecology), David Boese (Boese), an APA Assistant Engineer (Environmental), and Adams. O'Dell had reviewed the site and wastewater treatment system detail plans in January 2021<sup>34</sup> and on her April visit "field-confirmed that the absorption field for the proposed on-site wastewater treatment system would be a minimum of 100 feet from wetlands."<sup>35</sup> Boese "field confirmed that the absorption field for the proposed on-site wastewater treatment system would be a minimum of 150 feet from the nearest water body, an unnamed stream."<sup>36</sup>

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<sup>32</sup> Administrative Record R0197

<sup>33</sup> *Id.*, R0011, paragraph 5.

<sup>34</sup> Affidavit of Mary O'Dell sworn to October 21, 2021, paragraph 4

<sup>35</sup> *Id.*, paragraph 5

<sup>36</sup> Affidavit of David Boese sworn to October 21, 2021, paragraph 2.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -10-

Both the initial wastewater treatment system plan and details provided by Garso in January 2021 as well as the revised plan and details submitted in March 2021 were reviewed by Alicia Purzycki (Purzycki), a Professional Engineer 1 (Environmental) on the APA's Resource Analysis and Scientific Services staff. Purzycki noted that the 1988 Permit conditions for a wastewater treatment system called for an outdated and less environmentally protective design<sup>37</sup> which was not consistent with now-existing wastewater treatment standards and APA guidelines. For instance, the requirement of two feet of fill having a percolation rate of 15-45 minutes per inch below and/or around the distribution lines as well as in the "leaching portion"<sup>38</sup> was a standard or recommendation unheard of in the guidelines or regulations of the New York State Department of Health (NYSDOH) or any other health or environmental organization or agency<sup>39</sup>. Also, "[i]n absorption fields, where design standards do allow for the use of amended soils, a stabilized percolation rate of 15 to 45 minutes per inch is so slow that it could cause system failure, as the soils would be too compact to absorb the effluent"<sup>40</sup>. Also unparalleled was "a setback distance of 200 feet between a wastewater treatment system that meets all standards and waterbodies, wetlands, or private wells"<sup>41</sup>. Purzycki took note of the NYSDOH recommendation of "a final percolation rate of 5 to 10 minutes per inch to ensure adequate effluent flow through amended soils in absorptions fields"<sup>42</sup> and the APA's own guidelines limiting the pumping of waste more than 250 feet and prohibiting the piping therefor from crossing "wetlands, waterbodies, rights-of-way, property lines, or soils with any limiting feature."<sup>43</sup> She also considered the results of the "deep hole test pit in the location of the proposed system"<sup>44</sup> and two soils percolation test holes conducted by Garso showing, respectively, "seasonal high

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<sup>37</sup> Affidavit of Alicia Purzycki sworn to September 30, 2021, paragraphs 18-19.

<sup>38</sup> Administrative Record R0011.

<sup>39</sup> Purzycki affidavit *supra*, paragraph 19. While LaBombard cites New York City and Los Angeles County drinking water supply regulations as imposing 250-foot and 200-foot setbacks, respectively, Upper Saranac Lake is not a public drinking water source.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, paragraph 20.

<sup>42</sup> *Id.*, paragraph 19.

<sup>43</sup> *Id.*, paragraph 21.

<sup>44</sup> *Id.*, paragraph 26.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -11-

groundwater at a depth of 32 inches \* \* \* [and] no bedrock to a depth of at least 72 inches”<sup>45</sup> as well as “a stabilized percolation rate of slower than 1 minute per inch”<sup>46</sup>. Purzycki concluded that

“It is my professional opinion that the design proposed in the March Plans would provide better treatment and be more protective of groundwater, surface water, and wetlands that the system required in [the 1988 Permit]. Specifically, the design proposed in the March Plans meets or exceeds all APA and DOH setbacks and standards, uses enhanced treatment to reduce the amount of organic content prior to distribution to the absorption area and to reduce the amount of pathogens, viruses, nitrogen loading, and other organic contaminants in effluent, and uses amended soils to slow the percolation rate of effluent to the preferred range in the absorption field. Finally, the design proposed in the March Plans avoids the dangers associated with pumping waste approximately 1,000 feet along a right-of-way and across various properties upslope of wetlands and Upper Saranac Lake to an off-site system where neither amended soils nor enhanced treatment would be used.”<sup>47</sup>

The application for the permit amendment was deemed complete by the APA on April 12, 2021<sup>48</sup> and a minor project public notice inviting written comments from the public by May 6, 2021, and an interagency project notice were issued<sup>49</sup>. Dozens of written comments by individuals and organizations opposing the project were received by the APA<sup>50</sup>. Among the submissions were a May 2, 2021, report by ecologist Raymond P. Curran (Curran) detailing his survey of the vegetation of the wetland and concluding that the APA wetland rating should be “1” rather than “2”, and separate letters each dated May 4, 2021, from Mary Carillo-

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, paragraph 27.

<sup>47</sup> *Id.*, paragraph 36.

<sup>48</sup> Administrative Record R0202.

<sup>49</sup> *Id.*, R0202, R0208. The interagency notice involves the APA, the Department of Environmental Conservation, and the Department of Health.

<sup>50</sup> R0204-R0543.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -12-

Sheridan, an environmental engineer, and from Thomas LaBombard, a professional engineer, both of whom object to approval of an on-site wastewater treatment system on the Leinwand/Cicarelli property and implore the APA to require compliance with the 1988 Permit conditions for an off-site system near the tennis court with the requisite lengthy transmission piping. LaBombard's analysis and opinions were later expanded and incorporated into an affidavit sworn to October 15, 2021.

On May 12, 2021, Garso provided a set of the project plans to Ed Lagree, the code enforcement officer for the town of Santa Clara<sup>51</sup>. By a letter dated May 27, 2021, from John M. Burth (Burth), an APA environmental program specialist, it was determined that that "[t]he proposed building, access, water supply, and utility locations depicted on the 2021 Site Plan comply with the locations shown on the site plan for" the 1988 Permit and "no review or other approval is required from the Agency for construction of the dwelling and attached garage, access driveway, well, and underground utilities as depicted on the 2021 Site Plan"<sup>52</sup>. Leinwand/Cicarelli were instructed to remove "any kitchen installed in the 'studio apartment' depicted above the garage on the Site Plan . . . within 30 days of issuance of a certificate of occupancy for the dwelling"<sup>53</sup>. In addition, the APA advised that "no new review or approval is required from the Agency of the maintenance, repair, or replacement" of the paths, wooden walkways, bridges, and log corduroys providing access to the shoreline, or for the construction of the dock, which had been authorized by the 1992 Amendment, provided that "all work occurs in compliance with" that amendment and "Agency review and approval will be required for any other cutting or disturbance in wetlands"<sup>54</sup>. The permit amendment sought by Leinwand/Cicarelli was thus limited to the construction of an on-site sewage disposal system not less than 100 feet from wetlands rather than an off-site system which would "involve the pumping of waste more than 1,000 feet from Lot 9"<sup>55</sup> easterly within the common right-of-way across the Kern and Haidinger lots to an area south of tennis court and situated between the southerly

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<sup>51</sup> *Id.*, R0551-R0556.

<sup>52</sup> *Id.*, R0595.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, R0596.

<sup>55</sup> *Id.*, R0595.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -13-

boundary of the common right-of-way and the northern boundary of Lot #1<sup>56</sup>.

In addition to the numerous communications between Leinwand, Garso, Adams, and Burth contained in the administrative record, many of which are referred to above, internal APA documents<sup>57</sup> prepared by Adams, and reviewed by Burth on June 17, 2021, reveal that the APA reviewed relevant features and aspects of the proposed project. These included whether the principal buildings, access, wastewater treatment, water supply, utilities, and stormwater erosion and sediment controls complied with the 1988 Permit and APA regulations. Focusing on the criteria for amendment of the 1988 Permit's wastewater treatment conditions, Adams and Burth concurred in finding, *inter alia*, that the wetland at the site had a value rating of 2, no cutting of vegetation was proposed within 35 feet of the mean high water mark of Upper Saranac Lake or within 100 feet of any river, there was no aquifer present, the slope and soil was suitable for an on-site wastewater treatment system, and the on-site wastewater system was more than one hundred feet from jurisdictional wetlands, water bodies and streams.

Beginning in February 2021 and continuing into June, the APA received approximately eighty comments from various sources, including the petitioners-plaintiffs and their representatives, raising questions about, and objecting to the Leinwand/Cicarelli project. On June 18, 2021, the APA issued a public notice<sup>58</sup> and permit amendment (the "2021 Amendment")<sup>59</sup> which modified conditions 6 and 7 of the 1988 Permit so as to allow for construction and installation on the Leinwand/Cicarelli property of the on-site wastewater treatment system designed by Garso. In describing the project site, the 2021 Amendment again noted that the wetland area had a value rating of "2"<sup>60</sup>. The amendment did not authorize any cutting of trees or vegetation or disturbance of wetlands

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<sup>56</sup> See Respondent Leinwand Exhibit A, Map Showing Property Owned By Deerwood Associates by Bert K. Hough, L.S., completed February 2, 1987; also at Administrative Record R0023 in significantly reduced size.

<sup>57</sup> Administrative Record R0609-R0615.

<sup>58</sup> *Id.*, R0617.

<sup>59</sup> *Id.*, R0619-R0624.

<sup>60</sup> *Id.*, R0620.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -14-

which had not been previously authorized. .

## B.

The combined action and proceeding were commenced on July 26, 2021, by the electronic filing of a notice of petition, summons, and verified petition and complaint with exhibits together with supporting affidavits of the Kerns and the 2021 report by Curran. Upon assignment to this Court and review of the pleadings and papers, an order to show cause with temporary restraining order was issued to the extent that Leinwand/Cicarelli were prohibited from cutting trees on the project site, from disturbing any wetlands, and from taking action to construct the approved wastewater treatment system. A verified amended petition and complaint were filed on September 10, 2021, with the same exhibits and supporting affidavits as previously filed.

The amended pleading asserts five separate causes of action. In the first cause of action, petitioners-plaintiffs allege that the APA's approval of the wastewater treatment system was arbitrary and capricious because a hydrological and wildlife values study required by the 1988 Permit was not done, there was no precise mapping of wetlands and streams on or near the site, and the on-site wastewater treatment system had a low percolation rate and a separation distance from the high seasonal groundwater of 32 inches rather than the required 48 inches. The second cause of action alleges that the APA's decision was arbitrary and capricious and was an error of law because it did not evaluate the adverse impacts of the project on wetlands based on a value rating of "1", which was the proper rating had the study been conducted, and continued to apply an incorrect value rating of "2". In their third cause of action, it is alleged that the APA failed to undertake proper review of the project because it segmented review of the permit amendment and the 2021 Compliance Letter, Leinwand/Cicarelli proposed more than one single-family dwelling, amendment of conditions 6 and 7 of the 1988 Permit should have been considered a material change and require a new permit application rather than an amendment, the 2021 Compliance Letter allowed use of the existing walkway, and the APA failed to consider the adverse environmental impacts of the project. The fourth cause of action is premised on each subdivision lot being limited by the 1988 Permit to



MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -15-

having only one principal building and asserts that the 2021 Compliance Letter and 2021 Amendment are arbitrary and capricious and affected by error of law because the project here includes a proposed second principal building consisting of an attached garage structure with an upstairs residential apartment in addition to the single-family residence. In the fifth cause of action the petitioners-plaintiffs seek a declaration that the existing walking trails on the project site are for the benefit of the Deerwood Homeowners Association and its members under the 1988 Permit, the trails are thus open for use by the petitioners-plaintiffs, and Leinwand/Cicarelli should be enjoined from preventing such use.

Petitioners-plaintiffs allege that they and their properties will be uniquely affected by the impacts from development by Leinwand/Cicarelli and it will irreparably alter the character of the north basin of Upper Saranac Lake with adverse effects on wetlands and surrounding property. They claim that the wetlands have a value one wetlands rating which is the highest rating wetlands can have and both include active freshwater streams that are integral to maintaining the water quality of Upper Saranac Lake. Petitioners claim that the project will greatly impact the use and enjoyment of their properties and that they are entitled to maintain the action.

The APA served a verified answer and return consisting of the 624-page administrative record attached as an appendix, plus affidavits from APA Deputy Director of Regulatory Programs Robert Lore (Lore), Environmental Program Specialist John Burth (Burth), and Professional Engineer 1 Alicia Purzycki (Purzycki), an affirmation of counsel, and other exhibits. Leinwand/Cicarelli also filed a verified answer with two counterclaims which included an affirmation of counsel and affidavits from Leinwand and Marcus J. Magee, a professional title abstractor, and various exhibits including maps. The counterclaims are for money damages caused by the actions of the petitioners-plaintiffs in opposing the project and for sanctions due to the alleged frivolous nature of the fifth cause of action. The petitioners-plaintiffs served a verified reply to the counterclaims which included a counterclaim under Civil Rights Law §70-a against Leinwand/Cicarelli. As part of the reply, additional affidavits from Howard Kern, John Brennan, LaBombard, and counsel were submitted. In LaBombard's affidavit, he observed that the 250-foot

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -16-

limitation on piping was in place when the Kerns constructed their off-site wastewater treatment system in the tennis court area and were not granted a variance<sup>61</sup> from the other requirements of conditions 6 and 7 of the 1988 Permit. LaBombard also referenced New York City water supply code and the Los Angeles County municipal code which impose 250-foot and 200-foot setbacks, respectively, on wastewater treatment systems from wetlands, thereby contradicting Purzycki's claim that she was unaware of standards or regulations imposing a 200-foot setback from waterbodies for such systems. LaBombard also challenged Garso's soil examination methodology and asserted that "soil color descriptions . . . indicate that seasonal high groundwater could be as shallow as 8 inches below grade"<sup>62</sup> and that the result of a shallow test pit dug by Carillo-Sheridan on August 30, 2021, and an aerial drone survey conducted on July 30, 2021, reveal "the presence of SHGW at a depth less than 24 inches"<sup>63</sup>. LaBombard asserted that the Leinwand/Cicarelli proposal should be treated as a "material change [ for which] a more complete analysis of current wetland boundaries, depth to SHGW and the environmental impacts of constructing a subsurface treatment system under these unprecedented site conditions that do not meet APA's established guidelines or prior practices could have been performed."<sup>64</sup>

Leinwand/Cicarelli also moved to strike the reply affidavits of Howard Kern, LaBombard, and John Brennan, and to strike the first counterclaim in the petitioners-plaintiffs reply to counterclaims. As to the reply affidavits, the motion to strike is denied.

The petitioners-plaintiffs filed a motion for discovery of documents from the APA and to conduct a deposition of APA wetland biologist Mary O'Dell. This was opposed by the respondents and Leinwand/Cicarelli cross-moved to strike the counterclaim in the reply plus all or portions of the affidavits served with the reply. On October 29, 2021, oral argument occurred. The motion for discovery of certain documents from the APA was partially granted, and the temporary restraining order was vacated

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<sup>61</sup> There is nothing in the record, and the affidavits of the Kerns do not allege, that they applied for or were denied such a variance.

<sup>62</sup> Affidavit of Thomas LaBombard sworn to October 15, 2021, paragraph 38.

<sup>63</sup> *Id.*, paragraphs 47-49.

<sup>64</sup> *Id.*, paragraph 59.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -17-

and replaced by a limited preliminary injunction prohibiting Leinwand/Cicarelli from constructing a wastewater treatment system on the project site. An order so providing was signed and electronically filed on February 7, 2022.

Following discovery, additional submissions were received through May 13, 2022. One of the submissions by the petitioners-plaintiffs was an affidavit by Mallory N. Gilbert (Gilbert), a Certified Professional Soil Scientist, Certified Professional Wetland Scientist, Emeritus, and a Certified Professional in Erosion and Sediment Control. Gilbert opined that the “APA failed to conduct a thorough and rational review of the proposed septic system for Lot #9, and that the APA’s decision making was not based upon scientific analysis.”<sup>65</sup> According to Gilbert, the APA failed to: (1) determine the seasonal high groundwater (SHGW) level; (2) survey, map, and flag the wetland boundaries and stream locations; and (3) utilize existing soil survey data from the 2019 National Cooperative Soil Survey (NCSS) and consider the potential impacts upon Upper Saranac Lake and the adjoining properties from a failure of the proposed wastewater treatment system. Noting that the soils observed by Garso at the site in September 2020<sup>66</sup> “are often associated with sandy soil and are fairly common in the Adirondack Park and in the Upper Saranac Lake Watershed”<sup>67</sup> and that the soil in “the entire area is rated by the NCSS as ‘Very Limited’”<sup>68</sup>, Gilbert opined that such soils are “generally unsuitable for use as on-site sewage disposal, even taking into account New York State Department of Health (‘NYSDOH’) and APA requirements”<sup>69</sup> because they have “potential seasonal-high water tables as shallow as 17 cm ( $\pm$  7-inches) from the soil surface from April to June” and “limited filtering capacity”<sup>70</sup>. According to Gilbert, the soil amendment design approved by the APA – a two-foot thick layer below the bottom of a stone bed upon which rest the Puraflo modules – is

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<sup>65</sup> Affidavit of Mallory N. Gilbert sworn to March 3, 2022, paragraph 5.

<sup>66</sup> Gilbert also criticized Garso and the APA for not conducting the soil tests during the period of March to June when the water table would likely be at its highest (*id.*, paragraph 18).

<sup>67</sup> *Id.*, paragraph 17.

<sup>68</sup> *Id.*, paragraph 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*, paragraph 17.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -18-

fundamentally flawed because the amended soils will reach a depth of 32 inches below the soil surface and come “into direct contact with the estimated SHGW level (water table).”<sup>71</sup> This “can result in upward ‘capillary saturation’ into the fill materials [which] could reduce the proposed 24-inch separation from the bottom of the Puraflo stone beds to the water table, perhaps by several inches.”<sup>72</sup> Gilbert concludes, “[s]hould a septic system that is installed in the proposed location fail, especially in a significant way, impacts to the nearby wetlands, surface waters, and/or ground water resources would be extremely likely.”<sup>73</sup>

## C.

"When a petitioner challenges an administrative determination that was not made after a quasi-judicial hearing, the court must consider whether the determination was made in violation of lawful procedure, affected by an error of law, or arbitrary and capricious (*see CPLR 7803[3]; Matter of Gottlieb v. City of New York*, 129 A.D.3d at 725, 10 N.Y.S.3d 542; *Matter of JP & Assoc. Corp. v. New York State Div. of Hous. & Community Renewal*, 122 A.D.3d 739, 739, 996 N.Y.S.2d 633). A determination is arbitrary and capricious when it is without sound basis and reason and generally taken without regard to the facts (*see Matter of Wooley v. New York State Dept. of Correctional Servs.*, 15 N.Y.3d 275, 280, 907 N.Y.S.2d 741, 934 N.E.2d 310; *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321; *Matter of Gottlieb v. City of New York*, 129 A.D.3d at 725, 10 N.Y.S.3d 542)." (*Matter of Jefferson v New York City Bd. of Educ.*, 146 A.D.3d 779, 780, 44 N.Y.S.3d 535, 537, [2d Dept., 2017]).

"It is well settled that in reviewing administrative action a court may not

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<sup>71</sup> *Id.*, paragraph 28.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, paragraph 46.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -19-

substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (see *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 232, 356 N.Y.S.2d 833, 313 N.E.2d 321). Deference to the judgment of the agency, when supported by the record, is particularly appropriate when the matter under review involves a factual evaluation in the area of the agency's expertise (see *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 159)." (*Warder v Bd. of Regents of Univ. of State of N. Y.*, 53 N.Y.2d 186, 194, 440 N.Y.S.2d 875, 879, 423 N.E.2d 352, 356 [1981]). "If the [agency's] determination has a rational basis, it will be sustained, even if a different result would not be unreasonable' (*Matter of Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043, 962 N.Y.S.2d 587, 985 N.E.2d 898 [2013] [citation omitted])." (*Matter of Fuller v New York State Dept. of Health*, 127 A.D.3d 1447, 1448, 7 N.Y.S.3d 668, 670 [3d Dept., 2015]).

The claims of the petitioners-plaintiffs that the "APA assigned an incorrect wetlands value rating of '2'"<sup>74</sup> and otherwise challenge the wetlands rating are without merit and untimely. The wetland at issue has the same value rating now as it did in 1988<sup>75</sup>. The APA was not obligated to accept and abide by the assertions and opinions in the technical reports of LaBombard<sup>76</sup>, Curran<sup>77</sup> or Carillo-Sheridan<sup>78</sup>. No application to the APA for review and readjustment of the value rating of the wetlands here was made<sup>79</sup>, nor is the determination of any such application now under judicial review. The claim that the wetland value rating should be "1" rather than "2" is thus not ripe for judicial review. Nor may the petitioners-plaintiffs rely upon a vegetative study – not a "hydrological and wildlife values survey", as petitioners-plaintiffs contend<sup>80</sup> -- which was not done as required by 1988 Permit by the

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<sup>74</sup> *Id.*, paragraph 90.

<sup>75</sup> Administrative Record R0007.

<sup>76</sup> *Id.*, R0476-R0479.

<sup>77</sup> *Id.*, R0486-R0515.

<sup>78</sup> *Id.*, R0566-R0572.

<sup>79</sup> See 9 NYCRR §578.12 which requires an application for readjustment of freshwater wetlands maps within the Adirondack Park.

<sup>80</sup> Verified Amended Petition and Complaint, paragraphs 62, 77.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -20-

original developer, a third-party who is not a party to this combined action and proceeding. Judicial review of “[a]ny act, omission, or order of the agency or of any officer or employee thereof . . . must be made not later than sixty days from the effective date of the order or the date when the act or omission occurred” (*Executive Law §818[1]*). The alleged failure by the APA to ensure that the vegetative study was timely performed occurred by late 1988 or early 1989, and therefore the challenge to the wetland value rating is time-barred.

Also unavailing to the petitioners-plaintiffs is their claim that the garage structure’s “studio apartment” constitutes a second single family dwelling not authorized by the 1988 Permit. The determination of the APA that the studio apartment did not constitute a “single family dwelling” or “principal building” provided that the kitchen was “removed within 30 days of issuance of a certificate of occupancy for the dwelling”<sup>81</sup> was not arbitrary or capricious or affected by an error of law. Without the kitchen, and because the apartment was intended to be used only for guests of the single-family residence, the apartment is tantamount to a guest cottage accessory structure (*see, Executive Law §802[5]; 9 NYCRR §570.3[1]*).

Single family dwellings qualify for expedited review procedures requiring the APA “within approximately 15 business days after receipt of a completed application, [to] review and approve all such projects which do not involve a variance to the shoreline restrictions or other provisions of these regulations, and concerning which no public hearing will be held.” (*9 NYCRR 572.5[b]*). The 1988 Permit already authorized not only the construction of a “principal building”, the definition of which includes single family dwelling<sup>82</sup>, on the Leinwand/Cicarelli property but it also authorized an on-site soils replacement (nutrient entrapment) sewage disposal system at least 200 feet from wetlands, Upper Saranac Lake, and existing water supplies on adjoining properties<sup>83</sup>. No additional permit

<sup>81</sup> Administrative Record R0595.

<sup>82</sup> Executive Law §802.50; “Principal building means any one of the following: (1) a single family dwelling or mobile home constitutes one principal building;” (*9 NYCRR §570.3[ac]*).

<sup>83</sup> Administrative Record R0010-R0011; 1988 Permit, pages 10-11, paragraphs 5-7.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -21-

was required as long as those conditions were met. All that the 1988 Permit required of Leinwand/Cicarelli in order to construct the proposed residence on their property was the submission to the APA of proof that their project complied with the 1988 Permit. This could be accomplished by the submission of engineer-stamped site and wastewater treatment detail plans depicting the locations of the proposed residence, on-site wastewater treatment system, driveway, water supply, and power line, with reference to the various setback restrictions, and describing the elements of the wastewater treatment system in compliance with the 1988 Permit's conditions. Except for the 200-foot setback requirement and the requirement of two feet of fill with a percolation rate of 15 to 45 minutes per inch, the site and wastewater treatment system detail plans<sup>84</sup> complied with the conditions of the 1988 Permit. Thus, the APA did not violate or fail to comply with its procedures for amendment of existing permits (*9 NYCRR §572.19*). The deputy director of regulatory affairs, Robert Lore (Lore), after consulting with Burth on April 7-8, 2021, determined that the request to amend the 1988 Permit did not "involve a material change as defined in section 809(8)(b)(1) of the act" (*9 NYCRR §572.19(b)*)<sup>85</sup>. This was within his authority (*see, also, 9 NYCRR §572.11*), and it was not made in violation of lawful procedure, nor was it arbitrary or capricious or constitute an error of law.

The contention of the petitioners-plaintiffs that the on-site sewage system designed by Garso and approved by the APA violated the wastewater standards imposed by *9 NYCRR §574.4* is without merit. The cited regulation provides,

"Unless otherwise provided in an agency permit, wastewater treatment systems associated with a project which are designed to treat less than 1,000 gallons of wastewater per day shall be designed, installed and maintained in accordance with the standards set forth in "*Wastewater Treatment Standards--Residential Onsite Systems*"

<sup>84</sup> *Id.*, R0194-R0198. According to Garso, the design of the on-site system met or exceeded the NYSDOH standards (*see Exhibit "DOH-1" to Garso affidavit sworn to September 28, 2021*), and both Purzycki and NYSDOH District Office approved of the plans as complying with those standards.

<sup>85</sup> Affidavit of Robert Lore sworn to September 29, 2021.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -22-

Appendix 75-A, Title 10, of the *Official Compilation of Codes, Rules and Regulations of the State of New York*, and with the additional standards set forth in Appendix Q-4 of this Title." (*italics* as in original).

The NYSDOH District Office approved the design plans for the on-site sewage disposal system as being in compliance with the wastewater treatment standards for residential on-site systems<sup>86</sup>. According to the APA project guidelines for residential wastewater treatment systems, last updated in December 2015, piping distances should not exceed 250 feet and piping was "generally not allowed across wetlands, waterbodies, rights-of-way, property lines or soils with any limiting feature". As a result, the use by Leinwand/Cicarelli of the same area used by the Kerns for sewage disposal violated this current APA guideline. Additionally, Appendix Q-4 to the APA regulations prohibits the siting of the leaching component of a wastewater treatment system "within 200 feet of the shoreline of a lake, pond, river or stream, if the soil percolation rate is 0 to 3 minutes per inch"<sup>87</sup>. This prohibition is inapplicable to the design of the proposed system because the soil percolation rate for the leaching facility would be greater than 0 to 3 minutes per inch, namely, 10-15 minutes per inch, as a result of the removal of "fast percolation rate soil from the proposed absorption field or bed area [and] extending at least five feet beyond any proposed absorption trench or bed" along with the blending of that soil "with fill material with a percolation rate in the range of 15 to 20 minutes per inch"<sup>88</sup>. The material would be stabilized by natural settlement or mechanical compaction in six-inch layers and percolation tested to ensure that it met the permit condition requirements, all before construction of the sewage system<sup>89</sup>. Appendix Q-4 also requires that "[t]he natural ground intended for the leaching facility . . . shall have a minimum depth of four feet of usable soil above bedrock, impervious material, or maximum high seasonal groundwater."<sup>90</sup> While the SHGW in the location of the proposed field proposed is less than four feet, the APA considered all of the information

<sup>86</sup> See Exhibit "DOH-2" to Garso affidavit sworn to September 28, 2021.

<sup>87</sup> 9 NYCRR Appendix Q-4.

<sup>88</sup> Administrative Record R0194.

<sup>89</sup> *Id.*, R0194-R0196.

<sup>90</sup> *Id.*



MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -23-

relating to the project site, including the features of the enhanced system, it was and is within the province of the APA to grant a permit amendment modifying that requirement in light of the enhanced system proposed to be installed. This is so because 9 NYCRR §574.4 requires compliance with Appendix Q-4 “[u]nless otherwise provided in an agency permit”.

Although the analyses and opinions of Gilbert, LaBombard, and Carillo-Sheridan are compelling, they are not determinative. The lack of survey maps and flags delineating the boundaries of the wetlands and streams is inconsequential in light of the on-site visits by APA staff, who personally viewed the wetlands and streams in April 2021 when Gilbert contends the water table would likely be at its highest and determined the distance from their boundaries to and from the proposed wastewater treatment system. The SHGW and permeable soil conditions and risk of upward capillary saturation exist on all of the area properties and are not unique to the Leinwand/Cicarelli property. There is nothing to suggest that the impacts from a failure of the proposed wastewater treatment system would be any greater than would a failure of the existing wastewater treatment systems on the already improved lots of the subdivision. Indeed, the information submitted to the APA and confirmed by Purzycki’s analysis indicates that a failure of the Leinwand/Cicarelli wastewater treatment system would have less adverse environmental impact due to the enhanced features employed. Gilbert, LaBombard, and Carillo-Sheridan did not dispute, or even address, the reduction in total suspended solids (TSS) and biological oxygen demand (BOD) which the proposed enhanced system would create in the wastewater effluent. None of them provided a comparison analysis of the environmental impacts resulting from a failure of the proposed on-site system vis-à-vis a conventional or enhanced<sup>91</sup> wastewater treatment system in the same area as the Kern’s system with the attendant 1000+ feet of piping across wetlands from the Leinwand/Cicarelli building site. Since the entire area of the Deerwood Subdivision has soils rated “very limited” by the NCCS, the soils near the tennis court are no better for a wastewater treatment system, particularly a conventional system<sup>92</sup>.

<sup>91</sup> The requirements in conditions 6 and 7 of the 1988 Permit for on-site wastewater treatment systems do not apply to Lot #11 because those conditions neither reference Lot #11 nor provide for application to an “off-site” system.

<sup>92</sup> See footnote 79, *supra*.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -24-

Gilbert did not dispute Purzycki's opinion that compared to the 1988 Permit requirements the proposed design: (1) would provide better treatment and be more protective of groundwater, surface water, and wetlands; (2) meets or exceeds all APA and DOH setbacks and standards; (3) uses enhanced treatment to reduce the amount of harmful organic content and contaminants prior to entering the absorption field; (4) uses amended soils to slow the percolation rate of effluent to the NYSDOH-preferred range in the absorption field; and (5) is more environmentally sound and preferred than pumping waste 1,000± feet to an off-site system where neither amended soils nor enhanced treatment would be used.

The proposed on-site sewage system here does not violate the shoreline restrictions in Executive Law §806(1)(b), which requires that, "[i]n the case of all lakes, ponds, rivers and streams, the minimum setback of any on-site sewage drainage field or seepage pit shall be one hundred feet from the mean high-water mark in all land use areas". The site plan shows that the system is beyond the one-hundred-foot setback. No competent evidence establishes the existence of a stream, a term undefined in the APA Act and regulations<sup>93</sup>, located within 100 feet of the proposed on-site system or that there has been a determination of the "mean high water mark"<sup>94</sup> of such a stream. Notably, an APA intra-agency memorandum dated April 8, 2021, discloses that Adams, David Boese, and O'Dell visited the project site on April 7, 2021, and determined that there was an "unnamed stream at least 150 ft from the proposed [on-site wastewater treatment system] absorption area, as approximately measured by staff" and that the system "meets setback to wells, waterbodies and wetlands"<sup>95</sup>. The record and the APA's conclusions in the 2021 Amendment also do not support the allegations that the APA failed to comply with other cited provisions of article 27 of the Executive Law §806, or otherwise violated its "statutory duty to 'place environmental concerns above all others'"<sup>96</sup>. Indeed, the APA concluded that the on-site wastewater treatment system would not only be

<sup>93</sup> See Executive Law §802 and 9 NYCRR §570.3.

<sup>94</sup> Executive Law §802(37-a); 9 NYCRR §571.3.

<sup>95</sup> Affirmation of Claudia K. Braymer, Esq., dated March 4, 2022, and page 9 of exhibits thereto.

<sup>96</sup> Verified Amended Petition and Complaint, paragraph 57.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -25-

compatible with preservation of the entire wetland, but it also would not "result in degradation or loss of any part of the wetland or its associated values."<sup>97</sup> The APA considered the environmental impacts of approving the project and issuing the 2021 Amendment and the 2021 Compliance Letter and its determinations are neither arbitrary and capricious nor affected by an error of law.

Leinwand/Cicarelli properly applied for a variance from the conditions in the 1988 Permit for an on-site sewage disposal system, the APA conducted its review, solicited, and received public comment (9 NYCRR §572.10, §576.5), and considered the requisite criteria (9 NYCRR §576.1) as evidenced by its conclusions of law<sup>98</sup>. In the conclusions of law of the 2021 permit under review here, the APA determined that "the establishment of an on-site wastewater treatment system as conditioned herein \* \* \* will result in minimal degradation or destruction of the wetland or its associated values, and is the only alternative which reasonably can accomplish the applicant's objectives"<sup>99</sup>, both findings being those required by 9 NYCRR §578.10(a)(2)<sup>100</sup>. The APA even went beyond those requirements in concluding that the proposed on-site system "will be compatible with preservation of the entire wetland and will not result in degradation or loss of any part of the wetland or its associated values."<sup>101</sup> These findings belie the contention by the petitioners-plaintiffs that the APA failed to consider the proper criteria in that regulation<sup>102</sup> and/or that the project is prohibited by Executive

<sup>97</sup> Administrative Record R0622.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> "Unless the economic, social and other benefits to be derived from the activity proposed compel a departure from these guidelines, the agency shall not issue a permit for regulated activities in the following wetlands unless the findings set forth below are made. \* \* \* \*

(2) Wetlands rated 2. The proposed activity:

(i) would result in minimal degradation or destruction of the wetland or its associated values; and

(ii) is the only alternative which reasonably can accomplish the applicant's objectives; or

(iii) alternatively to subparagraph (ii), is the only alternative which provides an essential public benefit."

<sup>101</sup> *Id.*

<sup>102</sup> Verified Amended Petition and Complaint, paragraph 90.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -26-

Law §809(10)(e). Contrary to the assertion by the petitioners-plaintiffs<sup>103</sup>, and as evidenced by the administrative record and the conclusions of law in the 2021 Amendment, the APA did not fail to fully consider the wetlands impacts when it issued the 2021 Compliance Letter and the 2021 Amendment. It simply cannot be said that, as a matter of law, in issuing the 2021 Amendment the APA acted arbitrarily or capriciously or that its determinations were affected by an error of law.

Finally, there is no language in the 2021 Compliance Letter or in the 2021 Amendment which allows Leinwand/Cicarelli to cut and remove trees and vegetation within the wetlands or otherwise disturb the wetlands beyond that which was permitted in the 1988 Permit and 1992 Amendment. There is no basis to now prohibit that which was previously authorized. All other remaining contentions of the petitioners-plaintiffs have been examined and they are without merit.

For the foregoing reasons and based upon the administrative record, the challenged determinations of the APA were not made in violation of lawful procedure, have a rational basis, are not arbitrary or capricious, and were not affected by an error of law. The temporary restraining order prohibiting Leinwand/Cicarelli from constructing and installing the on-site sewage disposal system is vacated, and the respondents-defendants are entitled to partial judgment confirming the determinations of the APA and dismissing the first, second, third, and fourth causes of action in the amended petition-complaint as against all three respondents-defendants with costs.

## D.

In their reply to the counterclaims asserted by Leinwand/Cicarelli in their answer to the amended petition-complaint, the petitioners-plaintiffs included a counterclaim of their own as part of the fifth affirmative defense. The motion by Leinwand/Cicarelli to strike that counterclaim is premised upon CPLR §402 which limits the pleadings in a special proceeding to a petition, an answer, and a reply to a counterclaim and any new matter asserted in the answer. Since this

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<sup>103</sup> *Id.*, paragraph 91.

MATTER OF KERN, *et al.* v. ADIRONDACK PARK AGENCY, *et al.*

## Decision, Order &amp; Partial Judgment

Page -27-

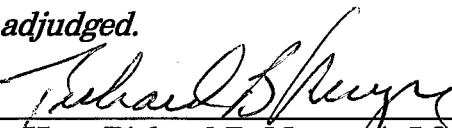
proceeding is a combined special proceeding and declaratory judgment action and the fifth cause of action is one for a declaratory judgment, the provisions of CPLR §3011 apply. The petitioners-plaintiffs here are counterclaimed defendants and have no right to assert their own counterclaim in their reply to the counterclaims of the counterclaiming plaintiffs Leinwand/Cicarelli. Their proper remedy is to either commence a separate action for the cause of action alleged in their reply, after which they can move to join or consolidate both actions, or move to amend the instant amended petition-complaint. The motion to strike the counterclaim of the petitioners-plaintiffs as part of the fifth defense in their reply to the counterclaims of Leinwand/Cicarelli is granted without prejudice and without costs.

## E.

The fifth cause of action in the amended petition-complaint and the counterclaims interposed by Leinwand/Cicarelli in their answer are severed as the respondent-defendant APA is no longer a party. Having served an answer to the amended petition-complaint and asserted the defenses of failure to state a cause of action, that the petitioner-plaintiffs lack standing, and that the causes of action are barred by the sixty-day statute of limitations (*Executive Law §818*), it was incumbent upon Leinwand/Cicarelli to seek dismissal of the fifth cause of action by a motion for summary judgment (*CPLR §3212*). No such motion has been made. Also, with regard to the counterclaims which seek monetary relief, CPLR 4101 provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only". Thus, it would be premature for this Court to grant any relief on either the fifth cause of action or on the counterclaims without first affording the parties the right to discovery, motions, and the filing of a note of issue (*see, Strachman v Palestinian Auth.*, 73 A.D.3d 124, 127, 901 N.Y.S.2d 582, 583 [1st Dept., 2010]).

*It is so ordered and partially adjudged.*

ENTER

  
\_\_\_\_\_  
Hon. Richard B. Meyer, A.J.S.C.



NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Case Caption: **Suzanne Carrillo Kern et al v. Adirondack Park Agency et al**Judge Name: **Richard B Meyer**

Doc#	Document Type/Information	Status	Date Received	Filed By
1	PETITION	Processed	07/26/2021	Braymer, C.
2	EXHIBIT(S) Compliance Letter	Processed	07/26/2021	Braymer, C.
3	EXHIBIT(S) Permit Amendment	Processed	07/26/2021	Braymer, C.
4	EXHIBIT(S) 1988 Permit	Processed	07/26/2021	Braymer, C.
5	EXHIBIT(S) Communications	Processed	07/26/2021	Braymer, C.
6	EXHIBIT(S) Suzanne Kern Affidavit	Processed	07/26/2021	Braymer, C.
7	EXHIBIT(S) Septic overlay map	Processed	07/26/2021	Braymer, C.
8	EXHIBIT(S) Curran Ecology Report	Processed	07/26/2021	Braymer, C.
9	NOTICE OF PETITION ACCOMPANYing COMMENCEMENT DOC(S)	Processed	07/26/2021	Braymer, C.
10	SUMMONS WITH NOTICE (FEE PREVIOUSLY PAID)	Processed	07/26/2021	Braymer, C.
11	ORDER TO SHOW CAUSE - ACCOMPANYing COMMENCEMENT DOC(S) (PROPOSED) Proposed Order to Show Cause with request for TRO	Processed	07/26/2021	Braymer, C.
12	AFFIDAVIT OR AFFIRMATION IN SUPPORT OF PROPOSED OSC/EXPARTE APP CKB Affirmation	Processed	07/26/2021	Braymer, C.
13	AFFIDAVIT OR AFFIRMATION IN SUPPORT Kern Affidavit	Processed	07/26/2021	Braymer, C.
14	EXHIBIT(S) Letters/reports	Processed	07/26/2021	Braymer, C.
15	EXHIBIT(S) Compliance Letter	Processed	07/26/2021	Braymer, C.
16	EXHIBIT(S) Photographs of the construction on the site	Processed	07/26/2021	Braymer, C.
17	RJI -RE: NOTICE OF PETITION	Processed	07/26/2021	Braymer, C.
18	OTHER COURT FILED DOCUMENT Judicial Assignment Notice	Processed	07/27/2021	Court User
19	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	07/30/2021	Botelho, B.
20	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	07/30/2021	Botelho, B.
21	NOTICE OF APPEARANCE (POST RJI)	Processed	08/03/2021	Tallent, J.
22	ORDER TO SHOW CAUSE-SIGNED	Processed	08/03/2021	Court User



NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Doc#	Document Type/Information	Status	Date Received	Filed By
23	NOTICE OF ENTRY	Processed	08/04/2021	Botelho, B.
24	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	08/04/2021	Braymer, C.
25	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	08/04/2021	Botelho, B.
26		Deleted		
27	ACKNOWLEDGEMENT OF SERVICE	Processed	08/05/2021	Botelho, B.
28	SUPPORTING PLEADINGS Amended Notice of Petition originally filed 8/4/2021. Filed as non-motion document per Court instru	Processed	08/05/2021	Botelho, B.
29	ACKNOWLEDGEMENT OF SERVICE	Processed	08/13/2021	Botelho, B.
30	STIPULATION - OTHER - ( REQUEST TO SO ORDER ) Scheduling Stipulation (request for Judge to So Order)	Processed	08/23/2021	Braymer, C.
31	STIPULATION - SO ORDERED	Processed	08/31/2021	Court User
32	PETITION (AMENDED)	Processed	09/10/2021	Braymer, C.
33	EXHIBIT(S) Compliance Letter	Processed	09/10/2021	Braymer, C.
34	EXHIBIT(S) Permit Amendment	Processed	09/10/2021	Braymer, C.
35	EXHIBIT(S) 1988 Permit	Processed	09/10/2021	Braymer, C.
36	EXHIBIT(S) Letters/reports	Processed	09/10/2021	Braymer, C.
37	EXHIBIT(S) Suzanne Kern Affidavit	Processed	09/10/2021	Braymer, C.
38	EXHIBIT(S) Septic overlay map	Processed	09/10/2021	Braymer, C.
39	EXHIBIT(S) Curran Ecology Report (corrected) dated May 4, 2021	Processed	09/10/2021	Braymer, C.
40	MEMORANDUM OF LAW	Processed	09/10/2021	Braymer, C.
41	ANSWER IN SPECIAL PROCEEDING	Processed	10/01/2021	Tallent, J.
42	AFFIDAVIT Affidavit of Robert Lore	Processed	10/01/2021	Tallent, J.
43	AFFIDAVIT Affidavit of John Burth	Processed	10/01/2021	Tallent, J.
44	EXHIBIT(S) APA guest cottage guidance	Processed	10/01/2021	Tallent, J.
45	AFFIDAVIT Affidavit of Alicia Purzycki	Processed	10/01/2021	Tallent, J.
46	EXHIBIT(S) APA residential wastewater treatment system guidance	Processed	10/01/2021	Tallent, J.



NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Doc#	Document Type/Information	Status	Date Received	Filed By
47	AFFIRMATION Affirmation of Joshua M. Tallent	Processed	10/01/2021	Tallent, J.
48	EXHIBIT(S) Deerwood wetland vegetation inventory	Processed	10/01/2021	Tallent, J.
49	MEMORANDUM OF LAW	Processed	10/01/2021	Tallent, J.
50	APPENDIX Certified administrative return volume 1	Processed	10/01/2021	Tallent, J.
51	APPENDIX Certified administrative return volume 2	Processed	10/01/2021	Tallent, J.
52	APPENDIX Certified administrative return volume 3	Processed	10/01/2021	Tallent, J.
53	APPENDIX Certified administrative return volume 4	Processed	10/01/2021	Tallent, J.
54	ANSWER IN SPECIAL PROCEEDING	Processed	10/01/2021	Phillips, D.
55	AFFIRMATION	Processed	10/01/2021	Phillips, D.
56	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION	Processed	10/01/2021	Phillips, D.
57	EXHIBIT(S) APA Enforcement Compliance Letter	Processed	10/01/2021	Phillips, D.
58	EXHIBIT(S) APA Wastewater Treatment Guidance	Processed	10/01/2021	Phillips, D.
59	EXHIBIT(S) Legal Boardwalk through Wetlands Photo	Processed	10/01/2021	Phillips, D.
60	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION	Processed	10/01/2021	Phillips, D.
61	EXHIBIT(S) Garso Letter to NYSDOH	Processed	10/01/2021	Phillips, D.
62	EXHIBIT(S) NYSDOH Approval Email	Processed	10/01/2021	Phillips, D.
63	EXHIBIT(S) Garso Rebuttal to LaBombard	Processed	10/01/2021	Phillips, D.
64	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION	Processed	10/01/2021	Phillips, D.
65	EXHIBIT(S) Deerwood Subdivision Map	Processed	10/01/2021	Phillips, D.
66	EXHIBIT(S) Lots 9 & 10 Boundary Map	Processed	10/01/2021	Phillips, D.
67	EXHIBIT(S) Tax Map 443.1 Litigants Location Map	Processed	10/01/2021	Phillips, D.
68	EXHIBIT(S) Tax Map 442.2 Litigants Locations Map	Processed	10/01/2021	Phillips, D.
69	EXHIBIT(S) APA Permit No. 87-74 (1988)	Processed	10/01/2021	Phillips, D.





NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Doc#	Document Type/Information	Status	Date Received	Filed By
70	EXHIBIT(S) Deerwood Subdivision Map	Processed	10/01/2021	Phillips, D.
71	EXHIBIT(S) Lots 9 & 10 Boundary Map	Processed	10/01/2021	Phillips, D.
72	EXHIBIT(S) Tax Map 443.1 Litigants Location Map	Processed	10/01/2021	Phillips, D.
73	EXHIBIT(S) Tax Map 442.2 Litigants Locations Map	Processed	10/01/2021	Phillips, D.
74	EXHIBIT(S) APA Permit No. 87-74 (1988)	Processed	10/01/2021	Phillips, D.
75	EXHIBIT(S) APA Permit No. 87-74A: Paths & Boardwalks	Processed	10/01/2021	Phillips, D.
76	EXHIBIT(S) Declaration Common Area Definition	Processed	10/01/2021	Phillips, D.
77	EXHIBIT(S) Deed to Deerwood HOA	Processed	10/01/2021	Phillips, D.
78	EXHIBIT(S) Lot 9 Deerwood Deed to Yanchitis	Processed	10/01/2021	Phillips, D.
79	EXHIBIT(S) APA Permit 87-74D (2017)	Processed	10/01/2021	Phillips, D.
80	EXHIBIT(S) Lot 10 Deed to Kern (2018)	Processed	10/01/2021	Phillips, D.
81	EXHIBIT(S) Lot 9 Deed to Leinwand/Cicarelli	Processed	10/01/2021	Phillips, D.
82	EXHIBIT(S) Lot 3 Deed to Haidinger (2017)	Processed	10/01/2021	Phillips, D.
83	MEMORANDUM OF LAW IN OPPOSITION	Processed	10/01/2021	Phillips, D.
84	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	10/04/2021	Phillips, D.
85	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	10/04/2021	Phillips, D.
86	APPENDIX Certified administrative return volume 1	Processed	10/06/2021	Tallent, J.
87	APPENDIX Certified administrative return volume 2	Processed	10/06/2021	Tallent, J.
88	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION Amended Affidavit with no changes to Exhibits	Processed	10/13/2021	Phillips, D.
89	EXHIBIT(S) APA Enforcement Compliance Letter	Processed	10/13/2021	Phillips, D.
90	EXHIBIT(S) APA Wastewater Treatment Guidance	Processed	10/13/2021	Phillips, D.
91	EXHIBIT(S) Legal Boardwalk through Wetlands Photo	Processed	10/13/2021	Phillips, D.
92	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	10/15/2021	Phillips, D.
93	AFFIRMATION/AFFIDAVIT OF SERVICE	Processed	10/15/2021	Phillips, D.



NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Doc#	Document Type/Information	Status	Date Received	Filed By
94	REPLY TO COUNTERCLAIM(S)	Processed	10/15/2021	Botelho, B.
95	AFFIDAVIT OR AFFIRMATION IN REPLY Affidavit of John Brennan	Processed	10/15/2021	Botelho, B.
96	AFFIDAVIT OR AFFIRMATION IN REPLY Affidavit of Thomas LaBombard	Processed	10/15/2021	Botelho, B.
97	EXHIBIT(S) LaBombard CV	Processed	10/15/2021	Botelho, B.
98	EXHIBIT(S) LaBombard June 30, 2021 Report	Processed	10/15/2021	Botelho, B.
99	AFFIDAVIT OR AFFIRMATION IN REPLY Affidavit of Howard Kern	Processed	10/15/2021	Botelho, B.
100	EXHIBIT(S) Joint Letter to NYS Exec. Chamber	Processed	10/15/2021	Botelho, B.
101	EXHIBIT(S) Walking Trail Photo	Processed	10/15/2021	Botelho, B.
102	EXHIBIT(S) Aerial Photos	Processed	10/15/2021	Botelho, B.
103	MEMORANDUM OF LAW IN REPLY Reply Mem Law	Processed	10/15/2021	Braymer, C.
104	NOTICE OF MOTION	Processed	10/15/2021	Braymer, C.
105	AFFIDAVIT OR AFFIRMATION IN SUPPORT Braymer Affirmation in Support of Motion	Processed	10/15/2021	Braymer, C.
106	NOTICE OF CROSS-MOTION Notice of Motion to Strike	Processed	10/22/2021	Phillips, D.
107	AFFIDAVIT OR AFFIRMATION IN SUPPORT OF Affirmation in Support of Motion to Strike	Processed	10/22/2021	Phillips, D.
108	EXHIBIT(S) Response to KernReply Affidavit	Processed	10/22/2021	Phillips, D.
109	MEMORANDUM IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS-MOTION MOL In Support of Motion to Strike	Processed	10/22/2021	Phillips, D.
110	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION	Processed	10/23/2021	Tallent, J.
111	AFFIDAVIT Affidavit of Mary O'Dell	Processed	10/23/2021	Tallent, J.
112	AFFIDAVIT Affidavit of Davit Boese	Processed	10/23/2021	Tallent, J.
113	AFFIRMATION Rule 202.8-b(c) Technical Correction (DOC#55)	Processed	10/25/2021	Phillips, D.
114	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION Rule 202.8-b(c) Technical Correction (DOC#88)	Processed	10/25/2021	Phillips, D.
115	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION Rule 202.8-b(c) Technical Correction (DOC#60)	Processed	10/25/2021	Phillips, D.



NYSCEF

Essex County Supreme Court

## Document List

Index # CV21-0370

Created on:06/28/2022 04:26 PM

Doc#	Document Type/Information	Status	Date Received	Filed By
116	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION Rule 202.8-b(c) Technical Correction (DOC#64)	Processed	10/25/2021	Phillips, D.
117	MEMORANDUM OF LAW Rule 202.8-b(c) Technical Correction (DOC#83)	Processed	10/25/2021	Phillips, D.
118	AFFIDAVIT OR AFFIRMATION IN REPLY	Processed	10/28/2021	Botelho, B.
119	EXHIBIT(S) Carte v. Fort Ann decision	Processed	10/28/2021	Botelho, B.
120	AFFIDAVIT OR AFFIRMATION IN OPPOSITION TO MOTION Affirmation in Opposition to Motion to Strike	Processed	10/28/2021	Botelho, B.
121	ORDER - (PROPOSED) "SUBMIT ORDER" PER JUDGES DECISION	Processed	12/02/2021	Tallent, J.
122	ORDER - (PROPOSED) "SUBMIT ORDER" PER JUDGES DECISION	Processed	12/02/2021	Tallent, J.
123	LETTER / CORRESPONDENCE TO JUDGE Petitioners' Letter to Court re. Discovery Order	Processed	12/02/2021	Botelho, B.
124	ORDER ( PROPOSED ) Petitioners' Proposed Discovery Order	Processed	12/02/2021	Botelho, B.
125	TRANSCRIPT OF PROCEEDINGS 10/29/2021 Hearing Certified Transcript	Processed	12/02/2021	Botelho, B.
126	LETTER / CORRESPONDENCE TO JUDGE	Processed	12/02/2021	Tallent, J.
127	LETTER / CORRESPONDENCE TO JUDGE	Processed	12/06/2021	Botelho, B.
128	LETTER / CORRESPONDENCE TO JUDGE	Processed	12/06/2021	Phillips, D.
129	LETTER / CORRESPONDENCE TO JUDGE	Processed	12/07/2021	Botelho, B.
130	ORDER - OTHER - *Corrected* motion #2	Returned For Correction	02/07/2022	Court User
131	ORDER - OTHER	Returned For Correction	02/04/2022	Court User
132	ORDER - OTHER	Processed	02/07/2022	Court User
133	ORDER - OTHER	Processed	02/07/2022	Court User
134	NOTICE OF ENTRY	Processed	02/09/2022	Botelho, B.
135	NOTICE OF ENTRY	Processed	02/09/2022	Botelho, B.
136	LETTER/CORRESPONDENCE FROM COURT	Processed	02/22/2022	Court User
137	LETTER / CORRESPONDENCE TO JUDGE	Processed	03/04/2022	Tallent, J.



NYSCEF

Essex County Supreme Court

**Document List****Index # CV21-0370**

Created on:06/28/2022 04:26 PM

<b>Doc#</b>	<b>Document Type/Information</b>	<b>Status</b>	<b>Date Received</b>	<b>Filed By</b>
138	LETTER / CORRESPONDENCE TO JUDGE	Processed	03/04/2022	Phillips, D.
139	AFFIDAVIT OR AFFIRMATION IN SUPPORT	Processed	03/04/2022	Braymer, C.
140	EXHIBIT(S) APA's discovery documents	Processed	03/04/2022	Braymer, C.
141	AFFIDAVIT OR AFFIRMATION IN SUPPORT Mallory Gilbert Affidavit	Processed	03/04/2022	Braymer, C.
142	EXHIBIT(S) Gilbert CV	Processed	03/04/2022	Braymer, C.
143	EXHIBIT(S) NCSS soils data and maps	Processed	03/04/2022	Braymer, C.
144	EXHIBIT(S) NRCS and NOAA weather data	Processed	03/04/2022	Braymer, C.
145	LETTER / CORRESPONDENCE TO JUDGE	Processed	03/16/2022	Phillips, D.
146	LETTER / CORRESPONDENCE TO JUDGE	Processed	03/17/2022	Tallent, J.
147	LETTER / CORRESPONDENCE TO JUDGE	Processed	03/22/2022	Botelho, B.
148	LETTER / CORRESPONDENCE TO JUDGE	Processed	05/12/2022	Botelho, B.
149	LETTER / CORRESPONDENCE TO JUDGE	Processed	05/13/2022	Phillips, D.

# Supreme Court of the State of New York

## Appellate Division: Third Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
SUZANNE CARRILLO KERN, HOWARD KERN, JEFFREY HAIDINGER, JOHN BRENNAN, JEAN BRENNAN, MARY ANN RANDALL, and CHRISTOPHER COHAN,		Date Notice of Appeal Filed
- against -		
ADIRONDACK PARK AGENCY, PAUL LEINWAND, and MARIA CICARELLI,		For Appellate Division
Case Type	Filing Type	
<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration <input type="checkbox"/> Action Commenced under CPLR 214-g	<input checked="" type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review		
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.		
<input checked="" type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input checked="" type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
<input type="checkbox"/> Contracts		<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Prisoner Discipline & Parole		<input type="checkbox"/> Torts



Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment <input type="checkbox"/> Order <input checked="" type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment <input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: <b>Supreme Court</b>	County: <b>Essex</b>
Dated: <b>06/29/2022</b>	Entered: <b>06/29/2022</b>
Judge (name in full): <b>Richard B. Meyer, A.J.S.C.</b>	Index No.: <b>CV21-0370</b>
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
<p>Are any appeals arising in the same action or proceeding currently pending in the court? <span style="float: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</span></p> <p>If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.</p> <p>Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:</p>  	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	
Date Filed:	
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
<p>Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.</p> <p>Petitioners appeal from each and every part of the Decision, Order &amp; Partial Judgment of the Hon. Richard B. Meyer, dated June 29, 2022, that dismissed the first, second, third, and fourth causes of action in the Article 78 Petition challenging the Adirondack Park Agency's issuance of a Permit Amendment.</p>	



Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether Supreme Court erred in upholding Respondent Adirondack Park Agency's issuance of the compliance letter and Permit Amendment. Issues proposed to be raised include but are not limited to whether the compliance letter and Permit Amendment were arbitrary and capricious because APA, among other things, eviscerated substantial terms and conditions of a prior APA permit intended to protect the fragile wetland ecology of the property; APA lacked a rational basis for its decision to reverse a prior permit; APA failed to correctly apply the wetlands criteria; APA failed to treat the application as a new permit; APA failed to apply the shoreline restrictions; APA failed to consider undue adverse impacts; and approval of second principal building is arbitrary and capricious. Relief sought is vacatur and annulment of the Adirondack Park Agency's compliance letter and Permit Amendment.

### Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Suzanne Carrillo Kern	Petitioner	Appellant
2	Howard Kern	Petitioner	Appellant
3	Jeffrey Haidinger	Petitioner	Appellant
4	John Brennan	Petitioner	Appellant
5	Jean Brennan	Petitioner	Appellant
6	Mary Ann Randall	Petitioner	Appellant
7	Christopher Cohan	Petitioner	Appellant
8	Adirondack Park Agency	Respondent	Respondent
9	Paul Leinwand	Respondent	Respondent
10	Maria Cicarelli	Respondent	Respondent
11			
12			
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## Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Braymer Law, PLLC - Claudia Braymer, Esq.

Address: PO Box 2369

City: Glens Falls

State: NY

Zip: 12801

Telephone No: 518-502-1213

E-mail Address: claudia@braymerlaw.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):1-7

Attorney/Firm Name: NYS Attorney General, Environmental Protection Bureau - Joshua Tallent, Esq., Assistant Attorney General

Address: The Capitol

City: Albany

State: NY

Zip: 12224

Telephone No: 518-776-2456

E-mail Address: Joshua.Tallent@ag.ny.gov

Attorney Type: ☐ Retained ☐ Assigned ☒ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):8

Attorney/Firm Name: McPhillips, Fitzgerald & Cullum, LLP - Dennis Phillips, Esq.

Address: 288 Glen Street

City: Glens Falls

State: NY

Zip: 12801

Telephone No: 518-792-1174

E-mail Address: dphillips@mfcllp.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):9-10

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):





# NYSCEF Confirmation Notice

## Essex County Supreme Court

The NYSCEF website has received an electronic filing on 07/26/2022 04:54 PM. Please keep this notice as a confirmation of this filing.

**CV21-0370**

**Suzanne Carrillo Kern et al v. Adirondack Park Agency et al**

**Assigned Judge: Richard B Meyer**

### Documents Received on 07/26/2022 04:54 PM

<b>Doc #</b>	<b>Document Type</b>
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152	NOTICE OF APPEAL
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153	INFORMATIONAL STATEMENT
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### Filing User

Benjamin Michael Botelho | ben@braymerlaw.com | 6072599533  
Po Box 2369, Glens Falls, NY 12081

### E-mail Notifications

An email regarding this filing has been sent to the following on 07/26/2022 04:54 PM:

**BENJAMIN M. BOTELHO - ben@braymerlaw.com**

**CLAUDIA K. BRAYMER - claudia@braymerlaw.com**

**DENNIS J. PHILLIPS - dphillips@mfcllp.com**

**JOSHUA M. TALLENT - joshua.tallent@ag.ny.gov**